Office of the Attorney General
State of Texas

March 18, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Hugh W. Davis
Assistant City Attorney
City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76102

OR93-124

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18943.

The City of Fort Worth (the "city") has received two open records requests for the complete investigative file of an ongoing criminal investigation involving the shooting of a citizen by an off-duty City of Mansfield police officer.

You state that the first requestor has already been provided with information deemed public by *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).[1] You claim the remainder of the information is excepted by sections 3(a)(1), 3(a)(3) and 3(a)(8) of the Open Records Act, V.T.C.S. art. 6252-17a.

Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You argue that releasing the requested information might "cast the presumptively innocent [police officer] in a false light," and that "more acute concerns exist for the victim of the shooting." You also state that "[i]t would be difficult to argue that there is much in the file in which the public would have no legitimate interest." A previous decision of this office, Open Records Decision No. 579 (1990) at 3-8, ruled that false-light privacy issues were not a proper basis for exception under section 3(a)(1) of the Open Records Act. Common-law privacy has been considered by the supreme court in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation of the South* case created a two-pronged test for common-law privacy:

[1]We will assume for purposes of this decision that the information has also been provided to the attorney representing the victim's family.

whether 1) the information is of a highly embarrassing or intimate nature and the publication of such information would be highly objectionable to a reasonable person and whether 2) there is legitimate public interest in the information. 540 S.W.2d at 685. Being the victim of a shooting is neither highly embarrassing nor intimate. The incident is, moreover, of legitimate public interest. *See generally* Open Records Decision No. 422 (1984). The privacy claims you have raised under section 3(a)(1) of the Open Records Act do not prevent the disclosure of the requested information.

Section 3(a)(8) excepts

> records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

You have indicated that the investigation is continuing although the officer was no-billed by the Tarrant County Grand Jury on or about February 19, 1993. A law enforcement entity may raise the 3(a)(8) exception for its active criminal investigations. Open Records Decision No. 372 (1983) at 4. In light of your statement that the investigation is ongoing, you may withhold most of the information under section 3(a)(8).[2] However, we do not see how release of the newspaper clippings at the end of the file would damage the investigative process.

Section 3(a)(3) excepts

> information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Information must relate to litigation that is pending or reasonably anticipated to be excepted under section 3(a)(3). *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You informed us that the officer in question has been no-billed by the grand jury. You have presented no other information indicating that litigation is anticipated other than the fact that the second request was made by an attorney on behalf of the injured citizen's family. The mere fact that the request was made by an attorney is not in itself proof of pending or anticipated litigation. Open Records Decision No. 361 (1983) at 2. Section

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[2]Except of course for information found to be public under *Houston Chronicle Publishing Co.*

3(a)(3), therefore, does not except the newspaper clippings from disclosure. If the requestors wish to see them, the newspaper clippings must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-124.

Yours very truly,

Rebecca L. Payne
Section Chief
Open Government Section

RLP/SG/LBC/lmm

Ref.: ID# 18943
ID# 19210

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